

The claimant appeared by his attorney, David M. Bryan, of Wichita, Kansas. Respondent and insurance carrier appeared by their attorney, Lyndon W. Vix, of Wichita, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge and consists of the transcript of preliminary hearing of December 14, 1993, and the exhibits attached thereto.

ISSUES

The respondent and insurance carrier appeal the Preliminary Hearing Order of the Administrative Law Judge and contend this claim is not compensable as claimant failed to prove that he provided proper notice of accident as required by K.S.A. 44-520, as amended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Claimant failed to provide timely notice of accident pertaining to his alleged back injury of July 15, 1993, as required by K.S.A. 44-520. Therefore, this claim is not compensable.

The 1993 Kansas Legislature modified the law pertaining to notice of accident for work related injuries occurring on and after July 1, 1993. See L. 1993, Ch. 286, § 42. As claimant alleges accidental injury on July 15, 1993, the new law controls.

Our new notice statute reads:

"Except as otherwise provided in this section, proceedings for compensation under the workers' compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the **employer** within ten days after the date of the accident, except that actual notice of the accident by the **employer or the employer's duly authorized agent** shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers' compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of accident unless (a) actual knowledge of the accident by the **employer or the employer's duly authorized agent** renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice." (Emphasis ours.) K.S.A. 44-520.

The uncontroverted facts are that claimant alleges he injured his back on July 15, 1993, while working for the respondent, Manpower Temporary Services. At the time of the accident, claimant was working at the manufacturing plant of Evcon located in Wichita, Kansas. Subsequent to the alleged accident, claimant told the Evcon employees who were supervising his work activities that his back and neck were hurting. The record is unclear what claimant told these individuals or when these conversations took place. However, it is apparent from the record that the conversations took place prior to July 27, 1993, when claimant left work as a result of oil spilled on him.

Manpower had an on-site supervisor at the Evcon plant in July, 1993. Claimant did not report the accident to this individual despite the fact that he had been previously instructed in an orientation meeting as to the proper procedure in the event of a work related accident. During this orientation, claimant was given an information sheet that, among other things, specifically set forth the respondent's procedure for reporting accidents.

The respondent Manpower first received notice of accidental injury when claimant's attorney mailed notice of intent to file an application for preliminary hearing bearing a date of mailing of October 15, 1993. Assuming respondent received notice the day after mailing, approximately 93 days would have expired since the alleged date of accident.

In applying K.S.A. 44-520 to these facts, the Appeals Board finds that the respondent Manpower Temporary Services did not have notice or actual knowledge of the accident before October 15, 1993, as the Evcon employees that claimant allegedly reported his injury to were not duly authorized agents of the respondent. As the respondent did not have notice within 75 days of the date of accident, claimant may not proceed against Manpower Temporary Services under the Kansas Workers Compensation Act for this alleged work related injury.

AWARD

WHEREFORE, it is the finding, decision and order of this Appeals Board that, for preliminary hearing purposes, the Order of Administrative Law Judge John D. Clark dated December 14, 1993, is reversed; that claimant's alleged accident of July 15, 1993 is not compensable under the Kansas Workers Compensation Act due to the lack of timely notice; and that this proceeding be and hereby is remanded to the Administrative Law Judge for such additional proceedings herein as the parties may require.

IT IS SO ORDERED.

Dated this ____ day of February, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: David M. Bryan, 608 North Broadway, Wichita, Kansas 67214
Lyndon W. Vix, 125 North Market, Suite 1600, Wichita, Kansas 67202
John D. Clark, Administrative Law Judge
George Gomez, Director